

Filed for intro on 02/02/95
House Bill _____
By _____

Senate No. SB1077
By Crutchfield

AN ACT relative to power driven watercycle dealer franchises and to amend Tennessee Code Annotated, Title 47, Chapter 25.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. The distribution and sale of power driven watercycles in the state of Tennessee affects the general economy of the state and the public interest and welfare of its citizens. It is the intent of the general assembly and the purpose of this act to exercise Tennessee's police power to ensure a sound system of distributing and selling power driven watercycles and regulating the manufacturers, distributors, representatives and dealers of those vehicles to provide for compliance with manufacturer's warranties, and to prevent frauds, unfair practices, discriminations, impositions and to encourage the safe and harmonious use of power driven watercycles by our citizens.

SECTION 2. As used in this act, unless the context otherwise requires:

(1) "Community" means the relevant market area. For the purposes of this paragraph, "relevant market area" means the incorporated city or town in which the franchise is located.

(2) "Distributor" means a person who either:

(A) sells or distributes new power driven watercycles to new power driven watercycle dealers in this state; and

(B) maintains distributor representatives in this state.

(3) "Distributor branch" means a branch office maintained or used by a distributor for either:

(A) the sale of new power driven watercycles to new power driven watercycle dealers in this state.

(B) directing or supervising its representatives in this state.

(4) "Factory branch" means a branch office maintained or used by a manufacturer for either:

(A) the sale of new power driven watercycles to distributors or the sale of new power driven watercycles to new power driven watercycle dealers in this state, or

(B) directing or supervising its representatives in this state.

(5) "Financial institution" means a bank, trust company, savings and loan association, credit union, consumer lender, international banking facility or holding company licensed, regulated or insured by the state banking department, the federal deposit insurance corporation, the office of thrift supervision, the comptroller of the currency, the national credit union share insurance fund or the national credit union administration.

(6) "Franchise" means a contract between three or more persons if all of the following conditions are included:

(A) a commercial relationship of definite duration or continuing indefinite duration is involved;

(B) the franchisee is granted the right to offer, sell and service in this state new power driven watercycles manufactured or distributed by the franchiser;

(C) the franchisee, as a separate business, constitutes a component of the franchiser's distribution system;

(D) the operation of the franchisee's business is substantially associated with the franchiser's trademark, service mark, trade name, advertising or other commercial symbol designating the franchiser; and

(E) the operation of the franchisee's business relies substantially on the franchiser for the continued supply of new power driven watercycles, parts and accessories.

(7) "Franchisee" means a person who both:

(A) receives new power driven watercycles from the franchiser under a franchise;

(B) offers and sells new power driven watercycles to and services new power driven watercycles for the general public.

(8) "Franchiser" means a person who both:

(A) manufactures or distributes new power driven watercycles; or

(B) may enter into a franchise.

(9) "Importer" means a person who transports or arranges for the transportation of any foreign manufactured new power driven watercycles into the United States for sale in Tennessee.

(10) "Manufacturer" means any person who manufactures or assembles new power driven watercycles.

(11) "New power driven watercycles" means a power driven watercycle, other than a used power driven watercycle, that is held either:

(A) for sale by either the franchisee who first acquired the power driven watercycle from the manufacturer or distributor of the power driven watercycle; or

(B) for sale by another franchisee of the same line-make.

(12) "New power driven watercycle dealer" means a person who buys, sells, exchanges or offers or attempts to negotiate a sale or exchange of any interest in, or who is engaged in the business of selling new power driven watercycles or used power driven watercycles taken in trade on new power driven watercycles or used power driven watercycles purchased for resale.

(13) "Power driven watercycle" means any inboard, motor powered, jet propelled watercraft designed to carry one (1) operator and no more than two (2) passengers, riding upon as opposed to riding within.

(14) "Broker" means a person who for any fee, commission or other valuable consideration offers to provide, provides or represents that the person will provide a service of arranging or assisting in effecting the purchase of a power driven watercycle and who is not:

(A) a new power driven watercycle dealer or an employee or agent of a new power driven watercycle dealer;

(B) a used power driven watercycle dealer or an employee or agent of a used power driven watercycle dealer;

(C) a manufacturer or employee or agent of a manufacturer; or

(D) an auctioneer engaged in the power driven watercycle auction business.

(15) "Zone" means the geographic marketing area or district designated by the franchiser and serviced by the franchiser's factory or distributor branch.

SECTION 3.

(a) A franchiser shall file with the director a certified copy of the franchisee's written agreement with the manufacturer and a certificate of appointment as dealer or distributor.

(b) The certificate of appointment shall be signed as follows:

(1) by an authorized agent of the manufacturer of domestic power driven watercycles on direct manufacturer-dealer agreements;

(2) if the manufacturer is wholesaling through an appointed distributorship, by an authorized agent of the distributor on indirect distributor-dealer agreements;

(3) by an authorized agent of the importer on direct importer-dealer agreements of foreign made power driven watercycles;

(4) by an authorized agent of the distributor or indirect distributor-dealer agreements; or

(5) for a distributor's certificate of appointment, by an authorized agent of the manufacturer of domestically manufactured power driven watercycles or by an authorized agent of the manufacturer or importer of foreign made power driven watercycles.

(c) A franchiser is not required to file a written agreement or certificate of appointment if the manufacturer on direct dealerships meets all of the following conditions:

(1) utilizes the identical basic agreement for all of its franchised dealers or distributors in this state;

(2) certifies in the certificate of appointment that this blanket agreement is on file and that the written agreement with the dealer or distributor, respectively, is identical with the filed blanket agreement; and

(3) has filed with the director one copy of the agreement together with a list of franchised dealers or distributors.

(d) The manufacturer, distributor or importer shall notify the director within thirty days of any revisions or additions to the basic agreement on file or of franchisee supplements to this agreement.

(e) The annual renewal of certificates filed as provided in this section is not required.

(f) A manufacturer on direct dealerships, a distributor on indirect dealerships or an importer on direct dealerships who has filed with the director an agreement used by all of its franchisees in Tennessee, together with a list of all of these franchisees, and who knowingly fails to notify the director within thirty days of any revisions, changes or additions to the materials filed is guilty of a Class C misdemeanor.

SECTION 4.

(a) Each manufacturer shall file with the director a copy of the delivery and preparation obligations required to be performed by a dealer before delivery of new power driven watercycles to buyers. These delivery and preparation obligations constitute the dealer's only responsibility for product liability. The franchiser assumes all other product liability and will hold harmless the franchisee, except in the cases of unlawful sale, misrepresentation or unauthorized product modification.

(b) Any mechanical, body or parts defects arising from any express or implied warranties of the manufacturer constitute the manufacturer's product or warranty liability.

(c) The manufacturer shall reasonably compensate an authorized dealer at not less than his established and customary fee who performs work to rectify the manufacturer's produce or warranty defects or delivery and preparation obligations.

(d) The dealer shall furnish the purchaser of a new power driven watercycle with a signed copy of the manufacturer's delivery and preparation requirements indicating

that all of the requirements have been performed. The manufacturer shall pay the cost of the manufacturer's delivery and preparation requirements at not less than the franchisee's established and customary fee.

SECTION 5.

(a) Notwithstanding the terms, provisions or conditions of an agreement or franchise, a franchiser shall not cancel, terminate or refuse to continue any franchise unless the franchiser has good cause of termination or non-continuance.

(b) A franchiser shall not enter into a franchise for the purpose of establishing an additional new power driven watercycle dealership in any community in which the same line-make is then represented, unless there is good cause for the additional new power driven watercycles dealership under the franchise and unless it is in the public interest.

SECTION 6.

(a) If a franchiser seeks to terminate or not continue a franchise or seeks to enter into a franchise establishing an additional new power driven watercycle dealership of the same line-make, the franchiser shall, and the franchisee at any time may, file a notice with the director of intention to terminate or not continue the franchise or to enter into a franchise for additional representation of the same line-make.

(b) A notice of intention to terminate or not continue a franchise is not required from a franchiser until the conclusion of any review proceedings of the intention offered to the franchisee under the franchise.

(c) This section does not apply to any intended termination or non-continuance of a franchise that the franchisee elects voluntarily, pursuant to a plan established by the franchiser, to submit to binding arbitration.

(d) The relocation or the reopening of a dealership within two years after the closing within the area of responsibility assigned in the franchise is not considered an

additional dealership for purpose of this article if the location of the replacement dealership is not within five miles of an existing dealership of the same line-make.

(e) On receiving a notice of intention under this section, the director, within five (5) days after receipt of a notice of intention, shall send by certified mail, with return receipt requested, a copy of the notice to the franchiser and to the franchisee whose franchise the franchiser seeks to establish, terminate or not continue.

(f) If the franchiser intends to establish an additional new power driven watercycle dealership, the director shall send notice within five days after receipt to all franchisees of the same line-make in the community and to all other franchises located within eight miles of the proposed dealership by the shortest street route, if located outside the community, who are then engaged in the business of offering to sell or selling the same line-make. In counties with a population of less than one hundred fifty thousand (150,000) persons, the notice additionally shall be sent to all dealers located within twenty (20) miles of the proposed new franchise as determined by the shortest street route.

(g) The director shall address copies of notices to the principal place of business of the franchisees.

SECTION 7.

(a) A person who receives or is entitled to receive a copy of a notice provided for may object to the approval of a notice by filing a written objection with the director within fifteen (15) days after the date the notice was received by the person.

(b) If there is an objection to the establishment of a new power driven watercycle dealership, the objecting new power driven watercycle dealer shall submit evidence to the director to establish that:

(1) the objector is a new power driven watercycle dealer located in the same community as the proposed new power driven watercycle dealership, or

within eight miles by the shortest street route of the proposed dealership. If located outside the community, if the proposed franchise is located in a county with a population of less than one hundred fifty thousand (150,000) persons, a dealer of the same line-make located within twenty miles, as determined by the shortest street route, also has standing to object pursuant to this section; and

(2) the objector is providing facilities, equipment, parts, capital and personnel in substantial compliance with its contractual obligation to the franchiser.

SECTION 8. If the director intends to determine that the objector has established all of the reasons prescribed, the director shall notify the franchiser and allow the franchiser to submit evidence in rebuttal before the director makes a final determination. The director's determination is only for the purpose of establishing standing to object to the establishment of the new power driven watercycle dealer franchise. If no objection is filed within fifteen (15) days after the date the notice was received by the person or if the objector fails to establish all of the reasons prescribed, the director shall approve the notice.

SECTION 9.

(a) If a timely objection has been filed that meets all of the reasons prescribed, the director shall:

(1) enter an order fixing the time, which is within thirty (30) days of the date of the order, and place of a hearing on the objection;

(2) send by certified mail, with return receipt requested, a copy of the order to the same persons entitled to receive a copy of the notice provided for in section;

(3) appoint a member of the state bar who is designated as an administrative law judge to conduct the hearing and who shall be compensated under a contractual relationship.

(b) At the hearing the franchiser has the burden of proof to establish that good cause exists to terminate or not continue the franchise. If there is an objection to the establishment of a new power driven watercycle dealership, the franchiser has the burden of proof that good cause does exist.

(c) Evidence that would be admissible under the issues in such an action in a state or federal court is admissible in a hearing held by the administrative law judge. The administrative law judge shall reasonably apportion all costs between the parties, including compensation for the administrative law judge's services.

(d) The administrative law judge may:

- (1) issue subpoenas;
- (2) administer oaths;
- (3) compel the attendance of witnesses and the production of books, papers, documents and all other evidence; and
- (4) apply to the superior court in the county in which the hearing is held for a court order enforcing this subsection.

(e) A transcript of the testimony of all witnesses taken at the hearing shall be made and preserved. Within forty-five (45) days after the hearing, the administrative law judge shall make written findings of fact and conclusions of law and enter a final order.

(f) A party to the hearing before the administrative law judge may appeal. An appeal of a decision of an administrative law judge has preference over other civil matters and shall be heard at the earliest practicable date.

(g) As a condition to the appeal, the appealing party shall file a cash bond, a supersedes bond or its equivalent with the director. The bond shall be sufficient in amount to cover the damages incurred by the prevailing party, but the amount of the bond shall not exceed the lesser of fifty thousand dollars (\$50,000) or ten percent (10%) of the appealing party's net worth. The party may file alternatives to cash such as

certificates of deposit purchased from a financial institution licensed to do business in this state or bonds of the United States government.

SECTION 10.

(a) Notwithstanding the terms, provisions or conditions of an agreement or franchise, the following do not constitute good cause for the termination or non-continuance of a franchise:

(1) The change of ownership of the franchisee's dealership. This paragraph does not authorize any change in ownership that would have the effect of the sale of the franchise without the manufacturer's or distributor's consent. The consent shall not be unreasonably withheld. The burden of establishing the reasonableness is on the franchiser.

(2) The fact that the franchisee refused to purchase or accept delivery of any new power driven watercycles, parts or accessories or any other commodity or service not ordered by the franchisee.

(b) Notwithstanding the terms, provisions or conditions of any agreement or franchise, subject to subsection (d)(2), if there is a sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business or by stock transfer to the dealer's spouse, son or daughter, the franchiser shall give effect to such a change in the franchise.

(c) In determining whether good cause has been established for termination or non-continuance of a franchise, the administrative law judge shall take into consideration the existing circumstances, including the following:

- (1) the amount of business transacted by the franchisee;
- (2) the investment necessarily made and the obligations incurred by the franchisee in the performance of the franchisee's part of the franchise;
- (3) the permanency of the investment;

(4) whether it is injurious to the public welfare for the business of the franchisee to be discontinued;

(5) whether the franchisee has adequate new power driven watercycle facilities, equipment, parts and qualified management, sales and service personnel to reasonably provide consumer care for the new power driven watercycles sold at retail by the franchisee and any other new power driven watercycles of the same line-make;

(6) whether the franchisee refuses to honor warranties of the franchiser to be performed by the franchisee if the franchiser reimburses the franchisee for the warranty work performed by the franchisee;

(7) except as provided in subsection (a):

(A) failure by the franchisee to substantially comply with those requirements of the franchise that are determined by the administrative law judge to be reasonable and material.

(B) bad faith by the franchisee in complying with those terms of the franchise that are determined by the administrative law judge to be reasonable and material.

(d) In determining whether good cause had been established for entering into an additional franchise for the same line-make the administrative law judge shall take into consideration the existing circumstances, including the following:

(1) the amount of business transacted by other franchisees of the same line-make in that community;

(2) the investment necessarily made and the obligations incurred by other franchisees of the same line-make in that community in the performance of their part of their franchises; and

(3) where to the franchises of the same line-make in that community are providing adequate consumer care for the new power driven watercycle products of the line-make, including the adequacy of new power driven watercycle dealer sales and service facilities, equipment, supply of parts and qualified management, sales and service personnel.

SECTION 11. Any manufacturer of new power driven watercycles, factory branch, distributor, distributor branch, field representative, officer, agent or representative of power driven watercycles shall not coerce or attempt to coerce a new power driven watercycle dealer to either:

(a) accept delivery of new power driven watercycles, parts of accessories for power driven watercycles or any other commodities that the dealer has not ordered;

(b) enter into any agreement with the manufacturer, factory branch, distributor, distributor branch or representative of power driven watercycles;

(c) do any other act unfair to the dealer by threatening to cancel or not renew a franchise existing between the manufacturer, factory manufacturer, factory branch, distributor, distributor branch, field representative, officer or agent and the dealer.

SECTION 12. This act shall take effect July 1, 1995, the public welfare requiring it.